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Supreme Court, U.S.
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No. 00-5961

In The

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

Whether 28 U.S.C. §2244(b)(2)(A)'s prohibition on successive petitions that do not rely on a "new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court," requires that the new rule be specifically declared retroactive by this Court or whether an appeals court may examine this Court's precedent to determine whether the new rule is of the type available to those proceeding on collateral review?

II.

Whether *Cage v. Louisiana* falls within the second *Teague* exception of watershed cases of constitutional law?

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OPINIONS OF THE COURTS BELOW

The opinion of the court of appeals is not reported. It is found in the Joint Appendix at pages 14-15. The opinion of the district court is not reported. It is found in the Joint Appendix at pages 3-13.

STATUTORY PROVISIONS INVOLVED

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT OF FACTS

Sometime near 2:00 a.m. on March 20, 1975, Melvin Tyler telephoned his estranged lover, Gloria Augustine wanting to know if she would return to him, or if she planned on reuniting with her husband. She replied no to each question and informed him that she was hanging up the telephone. (Tr. p. 66) Approximately five to ten minutes later, without warning, Melvin Tyler fired five shots

from a twenty-two caliber revolver into the bedroom of Gloria Augustine. (Tr. p. 57) Tyler's own child, a newborn, Melba Augustine, was struck by three separate bullets, in the head, chest and hand, and died. (Tr. pp. 3-6) The bullets were fired through a square piece of cardboard covering a broken segment of the bedroom window. (Tr. pp. 12, 66) Powder burns on the cardboard indicated the gun was fired from a distance of one to three inches. (Tr. p. 32) The child was laying on a bed directly in front of and against the window. Gloria and her husband, Joseph Augustine, were also in the room on the bed or an adjacent bed. (Tr. pp. 57, 65)

Shortly after the shots were fired, Tyler began throwing bricks through nearly all the windows of the residence including the window adjacent to where the child lay. (Tr. pp. 10-11, 57, 67- 68) Gloria Augustine went to the aide of the newborn and then called out to Tyler, "Melvin my baby is dead." He responded, "Bitch I am going to kill you" and threw another brick through a window. (Tr. pp. 57, 68) In the house next door, Gloria Augustine's sister, Erma Damango, hearing all that was transpiring, called out to Tyler to stop, that the children were in the house. He responded by telling her to shut up, that he was "going to get the bitch," either "next" or "first." (Tr. p. 48)

Upon seeing that Tyler was about to gain entry into the house through the front door, Gloria Augustine, carrying the child, and Joseph Augustine fled out of the rear of the house. (Tr. p. 10-11, 74) Gloria entered her sister's house next door. When the two women heard shaking at the back door, the sister moved the refrigerator in front of it. (Tr. p. 69) Whereupon, Tyler threw a brick through a window at that residence. (Tr. p. 69) In the alleyway,

Joseph Augustine confronted Tyler and the two struggled until Tyler fled the area. (Tr. p. 58) The gun was recovered in the rear of a neighbor's residence. (Tr. p. 78)

At trial Tyler testified that he had been drinking and that after talking to Gloria he was "steamed" and did not have the intent to kill or hurt anyone especially not his daughter. (Tr. pp. 91-92)

SUMMARY OF ARGUMENT

The clear intent of 28 U.S.C. § 2244(b)(2)(A) is that only rules that have been explicitly determined by this Court to fall within one of the two exceptions to *Teague*'s prohibition against the retroactive application of new rules of constitutional law may serve as the basis for a successive writ of habeas corpus. Every court to have considered the issue, with the exception of the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000), has determined that the plain implication of the statute, notwithstanding the reviewing court's own consideration of the issue, is that only this Court can make new rules retroactive for purposes of succesive petitions by holding so directly.

The interpretation adopted by the Third Circuit, and advanced by petitioner, is inconsistent with the sections respect for the finality for criminal judgments. Absent an affirmative statement from this Court, the courts of appeals will no doubt be lead to varying and inconsistent determinations of the availability of new rules to prisoners attempting to file successive petitions. Furthermore, that Congress did not anticipate the interpretation advanced by petitioner, is reflected in the concurrent

requirements of § 2244 regarding a prima facie showing that the requirements of the section be satisfied, and that the motion to file successive petitions be ruled on within thirty days, and that the district court dismiss any claim that fails to satisfy the requirements of the section. Finally had Congress sought to employ the interpretation advanced by petitioner, it would have employed the *Teague* standard directly rather than including the requirement of action by this Court.

The two courts to address the retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990) prior to this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), determined that *Cage* did not satisfy the second *Teague* exception because *Cage* did not alter the elements essential to the fairness of a proceeding and was not a watershed rule of criminal procedure. They were correct. *Cage* provides an additional measure of protection to an existing guarantee of due process protection- against fundamental unfairness and is therefore not a watershed case.

ARGUMENT

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 2244(b)(2)(A) REQUIRES THAT THIS COURT SPECIFICALLY DECLARE THE COLLATERAL AVAILABILITY OF NEW RULES OF CONSTITUTIONAL LAW.

The issue of whether 28 U.S.C. § 2244(b)(2)(A) requires a specific declaration as to the collateral availability of new rules of constitutional law by this court or whether the statute can be fairly read to include the ability of federal courts to assess the availability of the

new rule on their own (by applying a traditional *Teague* analysis) has been raised on numerous occasions. In *In re Smith*, 142 F.3d 832 (5th Cir. 1998), an inmate serving a life sentence for second degree murder sought to file a successive petition raising a *Cage* claim. The Fifth Circuit held that while *Cage* constituted "a new rule of constitutional law", the Supreme Court had not itself made *Cage* retroactive to cases on collateral review, as required by 2244(b)(2)(A). *See also Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (although Court of Appeals had granted permission to file a successive petition, district court properly dismissed petition since Brown failed to identify any decision by the Supreme Court authorizing collateral review of his *Cage* claim).

In *In re Hill*, 113 F.3d 181 (11th Cir. 1997), a death row inmate sought to file a successive habeas petition, claiming that his *Cage* claim was exempt from the successive petition bar because it relied upon a new, retroactively applicable rule of constitutional law under 28 U.S.C. § 2244(b)(2)(A). The Court held that even though the Eleventh Circuit had previously held[1] that *Cage* should properly be retroactively applied to cases on collateral review, that conclusion did not justify review of a successive habeas action: "Hill's *Cage* claim [did] not satisfy the requirement that any new rule of constitutional law relied upon must have been 'made retroactive to cases on collateral review **by the Supreme Court**,' " since the United States Supreme Court had never so ruled. *Id.*, at 184 (emphasis in original).

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[1] *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994).

Similarly, in *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir. 1998), an inmate serving a life sentence for first degree murder sought to file a successive habeas petition raising a *Cage* claim. The First Circuit held that while *Cage* did indeed amount to "a new rule of constitutional law" that was "previously unavailable" to Rodriguez, the *Cage* rule had not been "made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A). The Court concluded that the plain language of the statute requires "an application to file a second or successive habeas petition [to] point to a Supreme Court decision that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding." *Id.* at 275. Since Rodriguez was unable to identify a Supreme Court decision rendering *Cage* retroactive to cases on collateral review, the Court rejected his application to file a successive petition.

The various circuit courts to have considered the issue had been in uniformity until the Third Circuit's decision in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) where the court concluded that while the statute encompasses direct retroactive application it further includes alternative methods through which this Court could cause a rule to become retroactive. *Id.* at 58. Specifically, the court concluded "that precedent that makes clear that a new constitutional rule that fits the Teague retroactivity exception suffices to make a rule retroactive for purposes of successive habeas petitions under AEDPA." *Id.* at 61.

To the extent that the intent of "made retroactive by the Supreme Court" is not self evident,[2] other elements of § 2244, specifically sections 2244(b)(3)(A), which requires that a petitioner first move for an order in the court of appeals authorizing the filing of a second or succesive petition in the district court, and subsection (b)(3)(D) which provides that the court of appeals shall grant or deny the motion within thirty days, indicate that the

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[2] *Brown v. Lensing*, 171 F.3d at 1032, quoting *In re Smith*, 142 F.3d at 835 ("the plain language of the statute requires an applicant to 'point to a Supreme Court decision that either expressly declares the collateral availability of the rule . . . or applies the rule in a collateral proceeding' "); *Rodriguez v. Superintendant, Bay State Correctional Center*, 139 F.3d at 274-275 ("Insofar as second or successive petitions are concerned, the statute's precedent-limiting provision, fairly read, eliminates the lower federal courts' role in deeming new rules of constitutional law a permissible basis for habeas relief"); *In re Hill*, 113 F.3d at 184 (to proceed under the § 2244(b)(2)(A) exception to the bar against successive petitions, applicant must establish that the Supreme Court has made the new rule of constitutional law retroactively applicable to cases on collateral review); *Bennett v. United States*, 119 F.3d 470, 471 (7th Cir. 1997) ("only when a decision has been specifically declared retroactive by the Supreme Court may it be used as the basis for a successive motion for habeas corpus"); *In re Vial*, 115 F.3d 1192, 1196-97 (4th Cir. 1997) (en banc) (rejecting argument that phrase "made retroactive to cases on collateral review by the Supreme Court" encompasses those situations in which Supreme Court precedent establishes that the new rule is of the type available to those proceeding on collateral review; "a new rule of constitutional law has been 'made retroactive to cases on collateral review by the Supreme Court' within the meaning of § 2255 only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding).

approach adopted by the Third Circuit was not anticipated by Congress. Under this scheme, it does not appear that Congress intended to restrict the federal courts of appeals to making retroactivity determinations under the gun so to speak and without the benefit of briefing by the state.

It is inconsistent with the sections "respect for the finality of criminal judgments" *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), that Congress intended the federal courts of appeals to engage in traditional *Teague* analysis via truncated motion practice on a consistent basis, especially where consistency would be the exception and not the rule. The authorization to file successive petitions could well become a function of the happenstance of the composition of the panel making the determination. Furthermore, the federal district courts would bare the weight of the retroactivity determination by virtue of their own gatekeeping function, see 28 U.S.C. § 2244(b)(4),[3] without the benefit of an opinion and with perhaps no more than an order authorizing the filing.

Additionally, the prima facie showing standard for granting authority to file second and successive petitions is inconsistent with the approach adopted in *West v. Vaughn*. To have courts of appeal conducting traditional *Teague* retroactivity analysis on the standard of a prima facie showing would certainly undermine the purpose of the statute. However, a court of appeal could readily determine whether this Court has or has not determined the retroactivity of a new rule. The dangers of this

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[3] "The movant must get through two gates before the merits of his petition can be considered." *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997).

approach are evident in *Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) where the court granted permission to file successive petition based on a prima facie showing under § 2244(b)(3)(C), "without intimating any view concerning the merits of Nevius' *Cage* claim, or any view regarding whether he has in fact met the requirements of 28 U.S.C. § 2244(b)." Furthermore, the prima facie showing standard is entirely consistent with § 2244(b)(2)(B)(i)'s exception to successive petitions concerning a previously undiscovered factual predicate, as actual satisfaction of this exception would be especially onerous on the court.

The limitation on the appealability of the denial of a motion to file a successive petition of § 2244(b)(3)(E) is yet another example that Congress intended direct action by the Court. To read the statute in any other fashion would include the possibility that similarly situated prisoners could well be greeted by divergent results depending on a particular circuit's evaluation of existing precedent, without a significant possibility of redress.

Furthermore, it appears the Third Circuit's construction of the statute was unduly influenced by the fact that it saw *Sullivan v. Louisiana* as persuasive authority for the proposition that *Cage* is an exception to the *Teague* bar. "In our view, even though *Sullivan* did not arise in the habeas context, it left no doubt as to how the *Cage* rule fits within retroactivity analysis. . . . We believe that, **in this setting**, *Teague* retroactivity survives AEDPA's enactment, and we hold that the constitutional rule announced by *Cage v. Louisiana* has indeed been 'made retroactive to cases on collateral review' within the meaning of 28 U.S.C. § 2244(b)(2)(A)." *West*, 204 F.3d at 55 (emphasis added). Such is not likely to be the case in the future.

Indeed, had this court decided the standard of review question in *Cage* itself, under the rationale of *West v. Vaughn* a federal appeals court would have been left to apply the *Teague* standard solely on the basis of the original opinion. In such a circumstance, it could not so easily be said that this Court had "made" the new rule retroactive unless that determination formed a part of the ruling. Grammatically, there would be no action to complement the verb. *Teague*, the decision, then becomes the actor in the verb "to make," not this Court. Clearly, the construction of this statute should not be governed by the providence that the standard of review for *Cage* errors was announced separately from the rule itself. Had Congress anticipated such a scheme, clearly, it would have chosen to employ the *Teague* standard directly, rather than dictating an additional requirement of action from this Court.

Furthermore, the providence of *Cage* and *Sullivan* having been decided separately further elucidates the difficulties with the Third Circuit's construction of the statute. Prior to *Sullivan* being rendered, there was uniformity that *Cage* could not be applied retroactively, however, *Sullivan* brought uniformity to the contrary assumption. Furthermore, one could envision a sequence of opinions by this Court whose result would bring an inverted swing of uniformity from retroactivity to non-retroactivity. In either scenario, the process, absent the prevailing safeguard of § 2244(b)(2)(A), would be no less than a disaster to a policy rooted in "respect for criminal judgements." *Calderon, supra*. Accordingly, it is imperative, the importance of which can be elucidated no more clearly than by the current misappliaction of *Teague*

through the monolithic acceptance *Cage* should be applied retroactively, that the prevailing construction of § 2244(b)(2)(A), that only this Court can make new rules retroactive by specific declaration, be maintained.

II. *CAGE V. LOUISIANA* ANNOUNCED A "NEW RULE"

Respondent concurs with petitioner that the rule announced in *Cage v. Louisiana* is a new rule of constitutional law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). The issue was one of first impression in *Skelton v. Whitley*, 950 F.2d 1037 (5th Cir. 1992) where the court considered that " 'a case announces a new rule if the result was not **dictated** by precedent existing at the time the defendant's conviction became final,' " and stated, "This is emphatically such a case," *Id.* at 1043, quoting *Teague v. Lane*, 489 U.S. at 301. The Louisiana Supreme Court, addressing the retroactivity of *Cage*, likewise determined that *Cage* announced a new rule. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992) In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992) the court stated, "Whether a trial court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." The Fifth Circuit's opinion remained unchanged following *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which prompted the court to state, "It is undisputed that Cage announced a new rule of constitutional law." *In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998). Indeed every court to reach the issue has determined that *Cage* announced a new rule. See Brief for Petitioner 13.

III. *CAGE V. LOUISIANA* IS NOT A "WATERSHED RULE" OF CRIMINAL PROCEDURE

Prior to this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) the two circuits that addressed the retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990) found that the decision did not fall within the second exception of *Teague v. Lane* for watershed rules of criminal procedure. In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992) the Fourth Circuit concluded without hesitation that although *Cage* "eliminates confusion and improves the accuracy of the trial, . . . it does not alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding." *Adams, supra* at 1312, citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (omitting citation and interior quotation marks). The court stated that these bedrock procedural elements remain the same. "The burden of proof is not changed. *Cage* does not alter the elements, it criticizes their dilution." *Ibid.* Similarly, the Fifth Circuit, in *Skelton v. Whitley*, 950 F.2d at 1045 (1992), the first decision to address the issue following *Cage*, concluded that *Cage* failed to conform to the second *Teague* exception as it was not a watershed case in the vain of *In re Winship*, 397 U.S. 358 (1970) and *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 1045.

Both courts' analysis were correct. If there was any doubt following *Teague* that the second exception requires conformity on two levels, it was clearly established in *Sawyer v. Smith*:

> Petitioner contends that the second *Teague* exception should be read to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments." . . . But this test looks only to half of our

definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist* but later abandoned in *Mackey* under which new rules that "significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist v. United States*, 394 U.S. 244, 262, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969). In *Teague*, we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also " 'alter our understanding of the bedrock procedural elements' " essential to the fairness of a proceeding. *Teague*, supra, 489 U.S. at 311, 109 S.Ct. at 1076 (plurality opinion) (quoting *Mackey*, 401 U.S., at 693, 91 S.Ct., at 1180).

497 U.S. at 242.

On remand from this Court to consider their decision in light of *Sullivan*, the Fourth Circuit, in *Adams v. Aiken*, 41 F.3d 175 (4th Cir. 1994), reiterated this Court's emphasis that to qualify under *Teague's* second exception a rule "must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Citing *Sawyer v. Smith*, 497 U.S. at 242 (internal citations and quotation marks omitted), and concluded that because a *Cage* error effected the accuracy of the conviction and that because

the error had been identified as structural error it qualified under the second *Teague* exception. *Id.* at 178-179. However, the court failed to address its previous holding that *Cage* did not alter the bedrock procedural elements essential to the fairness of the proceeding.

Accordingly, the Fourth Circuit's analysis is fundamentally flawed for failing to consider how *Cage* "altered the elements" as it did previously. *Humphrey v. Cain*, 120 F.3d 526, (5th Cir. 1997), *rehearing en banc*, 138 F.3d 552 (5th Cir. 1998), *cert. denied*, 525 U.S. 935 (1998), presents the identical shortfall. There the court acknowledged the Fourth and Eleventh Circuit's[4] analysis and concluded that because a *Cage* error is structural it falls within the ambit of the second *Teague* exception. *Id.* at 529.[5] The court did not consider its previous holding in *Skelton v. Whitley* that it could not classify *Cage* as a "watershed case." 950 F.2d at 1045.

Most recently, the Third Circuit addressed this issue in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) and just as

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[4] *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994).

[5] The decision of the Fifth Circuit is somewhat disturbing as the Court appeared to suggest that the AEDPA had supplanted the need for the *Teague* bar. "We need not fear that finding no *Teague* bar to claims such as Humphrey's will spawn scores of new habeas petitions. Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act. Of course, we do not have occasion to measure how high those barriers might be. We note only that the one-year statute of limitations, see 28 U.S.C. § 2244(d) & 2255, the restrictions on successive petitions, see 28 U.S.C. § 2244(b) & 2255, and the heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation."

in *Adams v. Aiken*, 41 F.3d 175, and *Humphrey v. Cain* the analysis was limited to *Cage's* conformity with *Teague's* fundamental fairness and accuracy requirements. The court did not discuss the requirement that the new rule be a watershed rule. In doing so the court failed to recognize that the fairness requirement must also embody a watershed rule as this Court explicity provided in *Teague*. "The second exception suggested by Justice Harlan – that a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty, **we apply with a modification**. The language used by Justice Harlan in *Mackey*[6] leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure." 489 U.S. 288, 310 (internal citations and quotations omitted, emphasis added).

The Second Circuit in *Gaines v. Kelly*, 202 F.3d 598 (2nd Cir. 2000) acknowledged the two components of *Teague*, and, after assessing the accuracy requirement, the

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[6] "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime." *Teague v. Lane*, 489 U.S. 288, 310, quoting *Mackey v. United States*, 401 U.S. 667, 693-694, (1971).

court confronted the requirement of a new watershed rule. The court's analysis focused on a comparison of the nature of *Cage* and the right to counsel saying, "The right to accuracy in instructions defining reasonable doubt resembles the right to counsel in that both rights are fundamental to the fairness of a criminal proceeding." *Gaines, supra* at 604. Further, that "Because any criminal conviction rendered pursuant to an unconstitutional definition of reasonable doubt is necessarily unfair, see *Teague*, 489 U.S. at 315, 109 S.Ct 1060, we conclude that the rule advanced by Gaines falls within the second exception to the *Teague* doctrine." *Id.* at 605. That *Cage* invokes the fairness requirement does not of itself provide a basis for concluding that *Cage* is a watershed rule. The *Gaines* court did not identify a shift or new component to basic due process.

Additionally, it does not appear that the court's selection of the right to counsel as a point of comparison was not without purpose as this Court has used *Gideon v. Wainwright*, 372 U.S. 335 (1963) as the paradigmatic example of a watershed rule. See *Saffle v. Parks*, 494 U.S. 484, 495 (1990). However, the comparison of *Cage* to *Gideon* does serve to highlight the fact that *Cage* is without watershed status. *Gideon* overruled *Bets v. Brady*, 316 U.S. 455 (1942) and held that the right to counsel was one of the fundamental rights essential to a fair trial and therefore obligatory upon the States by the Fourteenth Amendment. This clear break from the past and redefinition of ordered liberty is why *Gideon* stands as the paradigmatic example of a watershed rule. The Second Circuit's inability to place *Cage* in some form of historical context to rival *Gideon* further demonstrates that *Cage* is

not a watershed rule. Essentially, our society's concept of due process was not redefined by *Cage*, as it was in *Gideon*.

In *Nutter v. White*, 39 F.3d 1154, (1994) the Eleventh Circuit weighed in on the possible retroactivity of *Cage*[7] and, after concluding that *Cage* satisfied the requirement that the new rule relate to the accuracy of the conviction, concluded that *Cage* should be applied retroactively because "together with *Sullivan*, *Cage* has reshaped our view of the importance of precise reasonable doubt instructions." *Id.* at 1158. By its own terms, the court's realization that *Sullivan* clarified the nature of a preexisting right was an acknowledgment that *Cage* did not establish a new fundamental right. The court's analysis confirms that *Cage* does not qualify as a watershed rule.

That *Cage* does not fall within the second *Teague* exception is made abundantly clear in *Sawyer v. Smith*. In *Sawyer*, the petitioner sought retroactive application of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The new rule established in *Caldwell* was that misleading comments by a prosecutor in the penalty phase, which diminish the jury's sense of responsibility (the last word argument), created an unacceptable risk which could affect the reliability of the sentence and therefore violate the Eighth Amendment. The rule was an extension of the prohibition against prosecutorial argument that renders the sentencing trial fundamentally unfair established in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Although the rule in

[7] The decision served as the leading basis for the Tenth Circuit's conclusion in *Tillman v. Cook*, 215 F.3d 1116 (10th Cir. 2000) that *Cage* should be applied retroactively.

Caldwell was rooted in fundamental fairness and accuracy, this Court concluded that *Caldwell* failed to qualify under *Teague's* second exception as the rule was an addition to an underlying due process protection. *Cage* like *Caldwell* creates an "addititional measure of protection" above "an existing guarantee of due process protection against fundamental unfairness," *Sawyer v. Smith*, 497 U.S. at 243, the beyond a reasonable doubt standard of *In re Winship*. Both cases respond to an "unacceptable risk" that an underlying due process right has been violated and provide "a protection of systemic value." *Ibid.* For the same reasons *Caldwell* does not fit within *Teague's* second exception, *Cage* should not be applied retroactively. Neither petitioner nor any circuit court has identified a new component of basic due process to emerge from either *Cage* or *Sullivan*. *Cage* is not a "watershed rule" of criminal procedure.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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